IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-509

JOSEPH MONTY,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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October 23, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Joseph Monty, petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division, Second Department, of the New York State Supreme Court which affirmed a judgment of the Supreme Court, Queens County, convicting

the petitioner of the crimes of Bribe Receiving and Receiving Reward for Official Misconduct under Sections 200.10 and 200.25 of the New York State Penal Law. The New York State Court of Appeals has denied petitioner leave to appeal to that court and petitioner has exhausted all of his state remedies.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York affirming petitioner's conviction and the Order of the Honorable Harold A. Stevens, Judge of the New York Court of Appeals, denying leave to appeal to that court are as yet officially unreported. Copies of said opinions, however, are made a part hereof and are set forth in Appendix A.

JURISDICTION

The judgment of the Appellate Division, Second Department, of the Supreme Court, State of New York reaffirming petitioner's judgment of conviction was entered on July 29, 1974. Application for leave to appeal to the New York State Court of Appeals was denied on August 5, 1974. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the petitioner was denied due process and equal protection of the law under the Fourteenth Amendment where the Governor of the State of New York by specific designation appointed a particular judge to hear the petitioner's case while other defendants in the same county where the petitioner was tried, by court rules, had judges assigned to their cases by lot and random selection.

2. Whether the petitioner's constitutional right of confrontation was violated by the allowance during the trial of substantial hearsay testimony.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this case are the Sixth and Fourteenth Amendments to the United States Constitution. Under state law the appointment by the Governor of the specific judge in question was designated under Article 6, Section 27, of the New York State Constitution and Section 149 of the New York State Judiciary Law. (See Appendix C).

STATEMENT OF THE CASE

On September 19, 1972 the Governor of the State of New York, by Executive Order, established the Office of Special Prosecutor of the State of New York with jurisdiction to conduct investigations and proceedings against any and all corrupt acts and omissions by public officials "arising out of or connected with the administration of criminal justice of the City of New York." By said Order the five elected District Attorneys of the City of New York were superseded in this particular area and in conjunction with the appointment of the Special Prosecutor, Judge John M. Murtagh, Justice of the Supreme Court, New York County, was specifically designated by the Governor to hear all cases arising out of prosecutions by the Special Prosecutor. A copy of said Executive Order is made a part hereof and set forth in Appendix B.

Shortly after the appointment of the Special Prosecutor JOSEPH MONTY was arrested and charged with various counts of bribe receiving and official misconduct allegedly stemming from his position as the Chief Rackets Investigator in the Office of the Queens County District Attorney. A trial of the issues was had before the Honorable Justice Murtagh and a judgment of conviction was rendered by the jury

on November 5, 1973 with regard to the crimes of bribe receiving and receiving reward for official misconduct under Sections 200.10 and 200.25 of the New York State Penal Law. Thereafter, on March 18, 1974 JOSEPH MONTY was sentenced to an indeterminate term of imprisonment not to exceed four years. He commenced serving his sentence on September 16, 1974.

REASONS FOR GRANTING THE WRIT

THE PROCEDURES ESTABLISHED BY EXECUTIVE ORDER AND UNDER WHICH JOSEPH MONTY WAS TRIED PER SE ARE DISCRIMINATORY AND VIOLATE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The specific designation of a particular judge to try all of the cases initiated by the Special Prosecutor is discriminatory and violates both due process and equal protection of the law under the Fourteenth Amendment. In the County of Queens by specific court rules and in both the Federal Courts for the Eastern and Southern Districts, the assignment of judges to try cases is specifically designated to be a random selection where the judges are picked by lot. (See Rules

of the Supreme Court, Queens County, Section 796.5; Individual Assignment and Calendar Rules for the Eastern District, Rule 2; for the Southern District, Rules 4 and 11.) In New York it appears that court rules which are legally adopted have the force and effect of statutes and are binding on tribunals to which they are applicable. In re Matter of Moore, 108 N.Y. 280; In re Pequenos', 177 Misc. 223. The importance of assigning judges by lot has been recognized by the courts and even under Federal statutes provision is made for the disqualification of a judge upon the submission of an affidavit alleging bias or prejudice. See 28 U.S. Code 144 and U.S. v. Garrison, 340F. supp. 952 (D.C.E.C. La. 1972). In Garrison, the court stated all cases should be assigned to judges on a random basis and it should never be of any moment to a judge as to whether or not he sits on a particular case.

The specific designation of Judge Murtagh to handle Mr. Monty's case and all other cases initiated by the Special Prosecutor thus violates the Rules of the Supreme Court, Queens County, and leads to a denial of due process and equal protection of the law. It has been continually held that constitutional guarantees of due process and equal protection call for procedures in criminal trials which allow no invidious discrimination between persons and different

groups of persons. Griffin v. Illinois, 351 U.S. 12. In Griffin, supra, the Supreme Court citing Chambers v. Florida, 309 U.S. 227 and Yick Yo v. Hopkins, 118 U.S. 356, stressed that the central aim of our entire judicial system was that all persons charged with crimes must so far as the law is concerned stand on an equality before the bar of justice in every American Court. It has been consistently held that criminal laws of the state must be applied equally to all defendants. The court in Loper v. Beto, 440 F. 2d 934 (5th Cir. 1971), rev on other grounds 405 U.S. 473 (1972), stated at page 941:-

> "It is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions."

The procedure under which JOSEPH MONTY was tried both from the point of view of the Special Prosecutor and the specific Judge who tries all of the Special Prosecutor's cases was different from that involving other defendants tried in Queens County. The arrangement under which Mr. Monty's case was prosecuted by its very nature violates equal protection and due process of law. The same Governor who appointed

the Special Prosecutor specifically designated the trial judge and both of these offices have participated together in the indictment and trial of some 110 persons to date.

Under the procedure established Justice Murtagh has the responsibility to empanel and charge extraordinary panels of the Grand Jury when and where they are needed, to act as legal advisor to the Special Grand Jury, to give legal instructions when necessary, to pass upon arrest warrants, search warrants and eavesdropping applications, to receive indictments voted upon by said Grand Jurys and to review documents to determine the efficiency of evidence. In addition, to decide on pre-trial motions, set bail and to preside at the trial of all cases. It is interesting to note that in a recent New York Times article[1] Judge Murtagh was quoted extensively regarding his supervision over investigations of the Special Grand Jurys in the five counties of New York. Under this arrangement there cannot help but arise a conscious or unconscious relationship which effects the very fact and appearance of fairness and impartiality. In fact, in a recent decision by the Appellate Division, First Department, where a reversal was ordered, the court emphasized that the charge of Judge Murtagh

[1] New York Times, page 1, October 17, 1974

in that case when read as a whole was prejudicial in that it emphasized the strength of the prosecution's case in derogation of the requirement to give balanced instructions to the jury in a criminal trial. See People v. Richard Bell, 45 A.D. 2d 362 (1974).

The right to a fair and impartial Judge is a right protected by the Constitution of the United States. See Tumey v. State of Ohio, 273 U.S. 510 (1927); Matter of Murchison, 349 U.S. 133 (1950). In Murchison, the United States Supreme Court stressed the importance of the impartiality of a judge and stated "that every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." The American Bar Association Standards relating to the function of a trial judge also stresses the importance of impartiality on the part of the judiciary. Section 1.5 A.B.A. Standards 1972. See also 48 C.J.S., Section 72.

Thus in the instant case the special procedure established discriminated against the petitioner and denied him the right to a fair trial in violation of his rights to due process and equal protection of the laws.

The pro-prosecution bias of the trial judge which would naturally arise out of the special relationship established by the specific procedures, in fact manifested itself in specific occurrences throughout the petitioner's trial. Defense counsel, both in pre-trial motions and in two instances during the trial and sentence, moved to disqualify Judge Murtagh from hearing the case. All of said motions were denied. (See Record on Appeal, App. Div., pages 12a, 9, 1509).

These motions to disqualify were made on the basis that the trial judge had held an ex parte conference with the Special Prosecutor for several hours on the day just before trial. The record reveals that the trial court admitted to such a meeting and the Judge stated on the record that the conversations had to do with the general work of this investigation. At another point the trial judge refused to request that the jury be polled with regard to reading any newspaper articles on the case unless they were specifically informed that this was the request of the defense.

The record below also contains an affidavit of defense counsel, one JEFFREY ATLAS, that the trial judge actively attempted to obtain the petitioner's cooperation in other pending cases and

threatened to throw the book at him if he did not cooperate. See page 1381 of the Record. Other instances of partiality involving rulings on evidence are also present throughout the Record.

THE PETITIONER'S CONSTITUTIONAL RIGHT OF CONFRONTATION WAS VIOLATED BY ALLOWING HEARSAY TESTIMONY.

The petitioner's conviction was based on allegations that he had received the use of complimentary cars from Avis Rent-A-Car Company in return for assistance rendered by him in collecting bad debts owed by Avis Rent-A-Car customers. Throughout the trial testimony was allowed from several rent-a-car officials as to what one FRED MASSARO told them regarding his dealings with the petitioner. FRED MASSARO never testified at the trial and the entire case was based upon these alleged statements of Massaro.

Under the rulings in Bruton v. U.S., 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400, this constituted a violation of the defendant's right to confrontation. It should be noted that there was no provision for the allowance of these hearsay declarations as no conspiracy charge was present in the case. A full examination of the Record clearly reveals the full effect and scope of these various hearsay statements.

The issue regarding the constitutionality of the specific designation of the trial judge involved in the case at bar in cases involving the Special Prosecutor has been raised in numerous cases either completed or presently pending in the Courts of New York.

A somewhat similar issue has been raised in the Watergate trial presently pending, involving former Attorney General John Mitchell. U.S. v. Mitchell, 15 CrL 2196 (U.S. Dist. Ct., D.C. 4/30/74). The issue of whether a specifically designated judge who has participated in pre-trial conferences and investigations could properly sit as the trial judge is thus of great importance and extremely relevant at the present time and merits the attention of this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

DETERMINATION OF THE ISSUES IN THE COURTS BELOW:

DECISION OF JOHN M. MURTAGH, J.
October 16, 1973

SUPREME COURT OF THE STATE OF NEW YORK
EXTRAORDINARY SPECIAL AND TRIAL TERM
COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOSEPH MONTY,

Defendant.

MURTAGH, J.:

The defendant has made several motions, all of which will now be decided.

The defendant has applied for an order dismissing the indictment on the ground that the Executive Order appointing the Special Prosecutor is unconstitutional.

The application is without merit. Similar relief was denied in People v. Norman Levy, decided by the Appellate

Division, Second Department, N.Y.L.J., May 24, 1973, p. 19, col. 6.

At issue are the recent executive orders directing the Attorney General of the State of New York to appoint a special deputy attorney general to supersede each of the district attorneys in the five counties of New York City in all cases relating to the administration of criminal justice. The constitutionality and legality of these orders is free of any doubt. Legal and historical precedent justified the action of Governor Nelson A. Rockefeller. Recurring exposures of corruption in New York City mandated such action. See Pitler, Superseding District Attorneys, 41 Fordham L.Rev. 517-548 (1973).

The motion to inspect the grand jury minutes is granted.

After reading the grand jury minutes, the Court grants the motion of the defendant as follows:

The first and second counts are consolidated so that the defendant is charged as presently charged in the first count of the indictment except that the period covered shall read "November, 1969 and in or about November, 1972."

The third, fourth and fifth counts are dismissed.

The dismissal of these counts is predicated on the provisions of Article 155 of the Penal Law. Under Section 155.05-2e and Section 155.40, proof must be presented that there was an animus furandi. While this was not true under Article 80 of the old Penal Law, People v. Fichtner, 281 App.Div. 159, 118 NYS 2d 392 (1952), aff'd. mem. 305 NY 864, 114 NE 2d 212 (1953), it is a requirement under Section 155.05-2.

In all other respects, the motion to dismiss the indictment is denied.

That part of the motion for a bill of particulars is granted to the extent that answers to questions A.-1; B.-1; C.-1 shall be provided to defense counsel by the Special Prosecutor, and is in all other respects denied, as being evidentiary in nature (CPL § 200.90 subd. 3; People v. Spina, 14 A.D. 2d 505).

The motion for discovery is granted in accordance with the provisions of CPL 240.10 and 240.20, and is in all other respects denied.

The motion requesting an order in which the undersigned would disqualify himself from presiding at the trial of this indictment is denied.

Dated: October 16, 1973

s/ J.M.
J. S. C.

ORDER OF JOHN M. MURTAGH, J.
October 16, 1973

P R E S E N T :

Hon. JOHN MURTAGH
Justice

Ind. No. 2103/73

(SAME TITLE) OMNIBUS Motion to inspect the Grand Jury minutes and to dismiss the indictment; for a bill of particulars; for discovery and inspection and for disqualification of the Justice presiding at the trial of this ind.

The following papers numbered 1 to 3 submitted in this motion

Submitted JULY 3 ,1973
Argued ,197
Hearing ,197

Jeffrey Atlas, Esq.
For the Motion

Special Prosecutor
Maurice Nadjari
Opposed

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Notice of Motion and Affidavits Annexed	1 - 2
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Upon the foregoing papers, and the opinion of the Court herein, the motion is disposed of as follows: the first branch of the motion, to inspect the Grand Jury minutes and to dismiss the indictment, is granted to the extent that the first and second counts of the indictment are consolidated so that the defendant is charged as presently charged in the first count of the indictment except that the period covered shall read "November, 1969 and in or about November, 1972." The third, fourth and fifth counts of the indictment are dismissed. In all other respects the first branch of the motion is denied. The second branch of the motion, for a bill of particulars,

GRANTED:

Date: October 16, 1973

John J. Durante

JOHN MURTAGH
J.S.C.

Peo v.: JOSEPH MONTY
Ind.No. 2103-73

is granted to the extent that the Special Prosecutor is directed to furnish defense counsel the information sought in items A-1, B-1 and C-1. In all other respects the second branch of the motion is denied.

The third branch of the motion, for discovery, and inspection, is granted in accordance with the provisions of sections 240.10 and 240.20 of the Criminal Procedure Law and is denied in all other respects.

The fourth branch of the motion, to disqualify the Justice presiding at the trial of this indictment, is denied.

....JOHN.MURTAGH.....
J.S.C.

OPINION OF THE APPELLATE DIVISION,
SECOND DEPARTMENT, SUPREME COURT
OF THE STATE OF NEW YORK-July 29, 1974.

___A D 2d____ A - June 3, 1974.

1159 E The People, etc., respondent,
v. Joseph Monty, appellant.

Judgment of the Extraordinary Special and Trial Term, Supreme Court, Queens County, rendered March 18, 1974, affirmed.

During the course of the trial, the trial court repeatedly, and quite properly, reminded the jury of its duty not to discuss the case or read anything about it. On the fourth day of trial, defense counsel pointed to two small clippings in the Long Island Press reporting on the trial, and requested the court to poll the jury again to see if anyone had read either article. The Assistant Special Prosecutor contended that the two articles contained only a brief summary of the court testimony and could not prejudice defendant. Defense counsel persisted in asking for a poll of the jury. The court consented to defense counsel's request but insisted, over objection, that he would tell the jury that it was being polled at his request. The court thereafter so informed the jury. If the defendant was not entitled to have

the jury polled, the court should have denied his request. If he was entitled to have the jury polled the court should not have placed any possible onus for the request on the defense. However, in the entire setting of this case we deem the error harmless (CPL 470.05 subd. 1).

The case is remitted to the Extraordinary Special and Trial Term, Supreme Court, Queens County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5).

HOPKINS, Acting P.J., LATHAM, SHAPIRO, CHRIST and BRENNAN, JJ., concur.

July 29, 1974. 1159 E

PEOPLE v. MONTY, JOSEPH

ORDER OF THE HONORABLE
HAROLD A. STEVENS, JUDGE
OF THE NEW YORK COURT OF APPEALS,
DENYING LEAVE TO APPEAL. (8/5/74).

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HAROLD A. STEVENS,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

Joseph Monty

CERTIFICATE DENYING LEAVE

I, HAROLD A. STEVENS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
August 5, 1974

s/ Harold A. Stevens
Associate Judge

*Description of Order: Application for continuance of bail denied also.
HAS

APPENDIX B

EXECUTIVE ORDER

STATE OF NEW YORK
EXECUTIVE CHAMBER

EXECUTIVE ORDER NO. 57

TO: THE HONORABLE LOUIS J. LEFKOWITZ
ATTORNEY GENERAL OF THE STATE OF NEW YORK
STATE CAPITOL
ALBANY, NEW YORK

I. Pursuant to article IV section three of the Constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Queens at the County Court House and any other term or terms of the Supreme Court in and for the County of Queens, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand

juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Queens in violation of any provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of Queens in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servant arising out

of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement;

and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney of the County of Queens exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement

made hereunder; and that in such proceedings and actions the District Attorney of the County of Queens shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending.

II. Pursuant to subdivision 8 of section 63 of the Executive Law, I also find it to be in the public interest to require that you inquire into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 for the purposes of this requirement.

III. For purposes of this requirement the following terms have the following meanings:

(a) "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(b) "Public servant" means (a) any public officer or employee of the state or any political subdivision thereof or of any governmental instrumentality within the

state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

(c) "Corrupt acts and omissions" includes, but is not limited to:

(1) any act or alleged act by a public servant relating to his office but constituting an unauthorized exercise of his official functions;

(2) any failure or alleged failure by a public servant to perform a duty which is imposed upon him by State or local law or administrative rule or regulation or is clearly inherent in the nature of his office;

(3) any and all acts or omissions or alleged acts or omissions constituting a violation of the following sections or of the sections within the following articles of the Penal Law:

(i) Sections 135.60 and 135.65 (Coercion)

(ii) Article 155 (Larceny)

(iii) Sections 195.00 (Official Misconduct) and 195.05 (Obstructing governmental administration)

(iv) Article 200 (Bribery involving public servants and related offenses)

(v) Article 210 (Perjury and related offenses)

(vi) Article 215 (Other offenses relating to judicial and other proceedings;

(4) any and all acts or omissions or alleged acts or omissions constituting a violation of Penal Law articles 100 (Criminal Solicitation), 105 (Conspiracy), 110 (Attempt), and 115 (Criminal Facilitation) with respect to offenses defined in paragraph (3);

(5) any and all other offenses that may be properly joined with offenses defined in paragraphs (3) and (4);

IV. This requirement shall not apply to the management and conduct of the prosecution of any indictment filed in

said court on or before the date of this requirement.

G I V E N under my hand and the Privy Seal of the State at the Capitol in the City of Albany this 19th day of September in the year of our Lord one thousand nine hundred seventy-two.

(L.S.)

BY THE GOVERNOR

s/ Nelson A. Rockefeller

s/T.N. HURD
Secretary to the Governor

APPENDIX C

NEW YORK STATE CONSTITUTION
ARTICLE 6, SECTION 27.

(Extraordinary terms of the supreme court)

The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the time and place of holding the term and the justice who shall hold the term. The governor may terminate the assignment of the justice and may name another justice in his place to hold the term.

Adopted Nov. 7, 1961, eff. Sept. 1, 1962.

NEW YORK STATE JUDICIARY LAW
SECTION 149.

Governor may appoint extraordinary terms and name justices to hold them

1. The governor may, when, in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. In such event, the grand jury drawn to attend such term shall continue to serve thereat until discharged in the manner prescribed by law. A justice named to preside at an extraordinary term appointed under this section shall have power to order the drawing of a grand jury or grand juries in place of or in addition to the grand jury originally drawn for such term. Such other grand jury or grand juries shall be summoned in the manner prescribed for grand juries in general and shall be subject to all the provisions of law applicable to a grand jury summoned

pursuant to sections five hundred thirty-one, six hundred nine and six hundred eighty-four of this chapter.

2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division.

RULES OF THE QUEENS COUNTY
SUPREME COURT, SECTION 796.5(a)

**Assignment of Cases for Trial;
Method of Assignment**

(a) All indictments shall be assigned to the several parts of the criminal term by lot as hereinafter provided except that the justice presiding in Criminal Term, Part I, may without drawing or lot assign any indictment to a particular part whenever it appears that such indictment is related to another indictment theretofore assigned to that particular part for trial, or whenever such indictment names the same defendant as another indictment theretofore assigned to the particular part for trial. An assigned indictment shall remain in that part to which it was assigned for trial until disposition thereof, provided, however, that if in any particular term no justice is assigned to hold a part to which indictments had theretofore been assigned for trial which remain untried, such indictments awaiting trial at the conclusion of the term preceding that term for which no justice has been assigned to such part shall be returned to Criminal Term Part I for reassignment by lot to and among the other parts of the criminal term for which justices have been assigned. The justice presiding in a trial

part to which an indictment has been assigned may receive and dispose of a waiver of the right to trial by jury tendered by a defendant, and, at the discretion of said justice, the assigned indictment shall remain in said trial part notwithstanding the election to change the mode of trial from jury to non-jury.

SUPREME COURT, U.S.

NOV 25 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-509

JOSEPH MONTY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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STEPHEN P. SAWYER
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of the State of New York
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-509

JOSEPH MONTY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioner Joseph Monty seeks a writ of certiorari to review a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, rendered July 29, 1974, unanimously affirming his convictions of bribe receiving (N.Y. Penal Law §200.10) and receiving reward for official misconduct (N.Y. Penal Law §200.25).

Statement of the Case

On June 1, 1973, the petitioner, Joseph Monty, was indicted by the Extraordinary Special Grand Jury for the County of Queens for the crimes of bribe receiving (2 counts), grand larceny in the first degree by extortion, attempted grand larceny in the first degree by extortion, conspiracy to commit grand larceny in the first degree by extortion and receiving reward for official misconduct (2 counts). All counts of the indictment related to corrupt dealings that petitioner, as Chief Rackets Investigator of the Queens District Attorney's Office, had with Avis Rent-A-Car Systems, Inc. Prior to trial, the three counts relating to the crimes of grand larceny were dismissed and the two counts of bribe receiving were consolidated into one count.

The trial commenced on October 16, 1973, and on November 5, 1973, the petitioner was convicted of bribe receiving and one count of receiving reward for official misconduct. On March 18, 1974, petitioner was sentenced to an indeterminate term not to exceed four years on each conviction, sentences to run concurrently.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the petitioner challenged the Trial Court's failure to disqualify itself, the failure to charge an Administrative Code violation as a lesser-included offense, the failure to charge bribe receiving and receiving reward for official misconduct as inconsistent crimes, the sufficiency of the evidence of bribe receiving, the Trial Court's definition of

"official misconduct," and the propriety of the cross-examination of the petitioner.

The Appellate Division rejected these contentions and unanimously affirmed petitioner's convictions on July 29, 1974.

On August 5, 1974, Judge Harold A. Stevens of the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal to the Court of Appeals.

On September 6, 1974, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denied petitioner's motion for reargument.

In the instant petition, petitioner seeks certiorari pursuant to 28 U.S.C. §1257(3). In his petition he alleges that being tried by a specially appointed judge denied him due process and equal protection of the law under the Fourteenth Amendment and that his Sixth Amendment right to confrontation was violated by the admission of certain alleged hearsay testimony at trial.

Neither of these two claims was raised by petitioner on his appeal to the Appellate Division. The latter claim was raised by petitioner on a motion to reargue the decision of the Appellate Division. This motion was denied by the Appellate Division on September 6, 1974.

THE EVIDENCE AT TRIAL

The People's Case

Monty, as Chief Rackets Investigator, regularly received free cars from Avis Rent-A-Car during 1968-1972.

The petitioner, Joseph Monty, was, during the period 1967-1972, the Chief Rackets Investigator of the Queens County District Attorney's Office (618-9*).

During this time petitioner was in constant receipt of free cars from Avis Rent-A-Car Systems, Inc. (135-184; 372-3; 377). The evidence, establishing the receipt by petitioner of free cars was conclusive. From 1968 through November, 1971, he was given the free use on a monthly basis of a variety of new automobiles, including Plymouths, Dodges, Chryslers and a Cadillac (135-184). From November, 1971, through November, 1972, petitioner was given the use of a 1972 Chevrolet Impala, which was registered in his own name (372-3; 377). The value of the use of these cars, were a person to have paid the applicable market rate, was calculated to have been several thousand dollars. For these cars Monty never paid any money (Peo. Exhs. 1-20; 377; 478; 597; 762).

Pursuant to an understanding between him and Avis Rent-A-Car, Monty, in return for free cars, performed valuable law enforcement services for Avis.

Collection of Bad Debts

Charles Napolitano, an Avis District Manager, testified that there was a regular procedure at Avis for collecting unpaid debts (119). First, the rental agent would

* References are to the trial record.

make calls to the debtor (119). After that, the matter would be turned over to the Avis central collections department (119). If still uncollected, the matter went to an outside collection agency.

In early 1970 Napolitano had occasion to make use of Monty in a debt collection matter. Napolitano had a conversation with Ray Bonini, an employee working for him, concerning a collection problem involving a woman named Eleanor Modica (488). Mrs. Modica had rented several cars from Avis and had paid for the cars with bad checks (479). She had run up a debt to Avis of $1,093.88 over a period of two years (485). Avis had resorted to collection procedures within the company and then to outside collection agencies, all without success (479-80). After his conversation with Napolitano, Bonini called Monty and arranged to see him concerning the matter (488). He told Monty of Avis' unsuccessful collection efforts and that he wanted to prosecute Mrs. Modica, to which Monty responded affirmatively, advising him to bring over the material (489).

After Bonini's request for help in the Modica matter, petitioner had Mrs. Modica brought into the District Attorney's Office (697-8). Petitioner told her that he did not usually act as a collection agency and told her what she did was bad and that she could be prosecuted for it (699). He then asked her if she "wanted to go to jail" (699). Mrs. Modica replied that she did not (700). Petitioner then told her that she could avoid going to jail if she paid Avis (700). At this point, petitioner called Ray Bonini and asked him to come down (492-3). After Bonini arrived, he asked him,

in front of Mrs. Modica, whether he would be willing to forego prosecution if he received payment, to which Bonini assented (702-3; 493-4).

Petitioner then gave Mrs. Modica thirty days to pay (703). During that thirty day period, around the July 4th weekend, someone representing himself as a detective from the District Attorney's Office called her and told her she had a date to come in and pay and not to leave town (706-7). Subsequently, Mrs. Modica came in to Monty's office with a check for the full amount owed Avis, which was given to Bonini (704-5; 498). At no time was Bonini asked to sign a criminal complaint (500). At no time was any civil action commenced against Mrs. Modica by Avis (706).

Later in 1970, Napolitano again had occasion to make use of Monty in another collection matter. In the middle of the year Napolitano learned of a debt of some $5,000, half in unpaid bills and half in bad checks, owed Avis by a man named Walter Halpern (197). This debt, which had been accumulating for over a year, had been given out to a collection agency without success (197). After learning of the Halpern situation, Napolitano called petitioner and asked him to look into the matter, to which petitioner agreed (202-3). At petitioner's request, Napolitano delivered to him Halpern's unpaid rental agreements and bad checks (204).

Upon receiving from Napolitano the materials in the Halpern matter, Monty delegated the matter to Detective Murray Seliger (626-7). Seliger then called Halpern who told him it was a civil, not a criminal matter and that the District Attorney's Office shouldn't be involved (788; 633).

Monty relayed this information to Napolitano (209). Napolitano then inquired whether criminal charges could be preferred and, if so, whether collection was likely (209). Monty then told Napolitano that collection would be likely (210).

Subsequently, Halpern had a conversation with Seliger during which the amount of debt related to bad checks—$2,309—was totaled and given to him (791-2; 641; Peo. Exh. 28-C). Halpern was then told that he had been indicted and that to straighten it out he would have to pay Avis $3,000 with the balance of his debts in notes (790). Halpern asked whether $3,000 would "settle the entire indictment," to which Seliger replied that he would have to check with the foreman of the Grand Jury to find out if that would be sufficient to quash the indictment (791). Shortly thereafter Seliger said that Halpern would have to pay $3,000 and the balance in notes (791). Seliger denied this part of the transaction (647).

Halpern then went to his partner and borrowed $2,309 in the form of a certified check drawn on the Manufacturers Hanover Trust Company (792; Peo. Exh. 67). On March 25, 1971, Halpern brought the check to the District Attorney's Office and signed in to see Seliger (795; Peo. Exh. 68). He spoke to Seliger and to a Lieutenant Mahoney (797). Mahoney told Halpern that he was supposed to have come in with three thousand dollars (797-8). He said that the representative of Avis was in the next room and that this thing could be straightened out if Halpern paid the $3,000 and signed for the balance (798). Mahoney also told Halpern that if he didn't pay by the next day he would be locked up (798).

Visitors sheets maintained by the District Attorney's Office for March 25, 1971, show that Halpern was there to see Seliger that day and that Charles Napolitano had signed in to see petitioner (Peo. Exhs. 68, 82 and 83). Petitioner's office was in the same small portion of the District Attorney's Office as Detective Seliger's room (1107-9). Seliger denied that Halpern visited him that day (647-8).

Subsequently, Halpern was arrested and charged with larceny and, eventually, after pleading guilty to a misdemeanor, was ordered by a court to pay Avis as a condition to his discharge (804A-808). This he did do, by giving Avis a check for $2,309 and the balance in notes (808; 217).

After Halpern's sentence, Napolitano went to petitioner's office where petitioner told him that he and his staff had worked hard on the case at which point Napolitano offered, without objection, to give petitioner $500 (218-20). Napolitano then discussed the payment with the collections manager at Avis who later advised him that such payments were illegal (223-6). Notwithstanding this advice, Napolitano, with the consent of his boss, Salvatore Giuffrida, cashed an Avis petty cash check for $500 (226-32; Peo. Exh. 31).

On September 8, 1971, Napolitano went to the District Attorney's Office and signed the visitors sheet to see petitioner (232-3; Peo. Exh. 32). Napolitano met petitioner alone in his office and gave him $500 in cash in an envelope, which petitioner took (234). That same day, petitioner deposited $150 in cash in his account down the street from his office in the Sterling National Bank (1137; Peo. Exh. 84).

Cancellation of Alarms

Alarms are orders put out to all police to be on the lookout for a car described therein which has been reported to have been stolen (121). An alarm may be placed by Avis because a car is actually stolen or because a customer failed to return the car (121). It may also be placed because personnel in the Avis central car control office have misplaced or misfiled records of a car (536-38). For whatever reason the alarm was placed, its prompt cancellation is of economic value to Avis since a vehicle rented while an alarm is outstanding on it could result in the arrest of a legitimate customer and a subsequent lawsuit against Avis (122).

Joanne Held, a rental agent, accompanied Fred Massaro to petitioner's office, in the District Attorney's Office, where Massaro requested that an alarm on a stolen car be cancelled (575-9; Peo. Exh. 52). The cancellation was made by Monty (528-9).

On another occasion Richard Zaia, Avis car control manager, turned, through Fred Massaro of Avis, to Monty for the cancellation of alarms (558). In early 1970, Zaia requested help in cancelling some alarms from Massaro (543). After reporting that the alarms had been cancelled, Massaro told Zaia that his "Uncle Joe" (a reference to petitioner Monty) had cancelled the alarms (546). Avis' business records show at least one alarm listed as having been cancelled at that time by "Joseph Monty—D.A.'s Office Queens" (Peo. Exh. 55).

In February 1972, at the request of Salvatore Giuffrida, Monty cancelled several alarms for Avis by writing to the Police Department (Peo. Exh. 37).

Criminal Record Checks

A criminal record is a listing of all arrests a person has sustained (832). It is obtainable from the Identification Section of the New York City Police Department (832). The Identification Section is the only branch of the Police Department which keeps such records (834). While criminal records are confidential, the information may be obtained by a telephone call from a properly identified legitimate law enforcement official (838; 841). Once the official is properly identified, the information can be obtained by giving the Identification Section the name and date of birth of the subject of the inquiry (836-37). The use of the information, however, is limited to legitimate law enforcement purposes (841; Peo. Exhs. 78 and 78A).

Avis developed a need to obtain such information (716-18). The personnel department had to hire people who would handle money and who, therefore, had to be bonded (602; 714). Mary Elliott, Avis training manager, and a former rental agent, had a conversation with Gail Rachlin, a personnel manager for Avis (598; 715). In that conversation, Miss Elliott recommended petitioner as someone who could help with the problem (600; 718). After the conversation, Miss Elliott called Monty and told him about the problem (602). Petitioner said "fine" and offered to discuss the matter over lunch (602). Thereafter, petitioner met with Miss Elliott and Miss Rachlin for lunch at the Elks Club (603; 721). At that lunch the two Avis representatives explained Avis' need for applicants' criminal records (604; 722). Petitioner pointed out that he wasn't supposed to do that but agreed to obtain the information for Avis (604; 722-3).

After the luncheon petitioner did, on several occasions, inform Miss Rachlin of the criminal records, if any, of prospective Avis employees (724-7). Miss Rachlin would call petitioner and give him the subject's name and date of birth (724-5). Petitioner would then call back with "exactly what the individual was involved in, if anything" (725).

In September, 1971, petitioner and an Avis Zone Manager negotiated a continuation of the understanding under which petitioner would continue to get a free Avis car in return for his continued availability to serve Avis.

In the summer of 1971, Avis Zone Manager Salvatore Giuffrida made a decision to discontinue giving petitioner free cars (354). Shortly thereafter Giuffrida was contacted by Fred Massaro, who was about to leave Avis, concerning a continuation of the situation (355). Thereafter Giuffrida received several telephone calls from petitioner himself which Giuffrida did not return (362). Eventually, Monty contacted him and a luncheon meeting was arranged (363-65).

Shortly thereafter petitioner and Giuffrida met for lunch to discuss the free car arrangement (366-7). At that lunch, according to Giuffrida,

> "Monty specifically related to his past relationship with Avis Rent-A-Car and expressed a desire to continue that relationship, whereby he was helping us in different problems of collection, bad checks, placing alarms, removal of alarms, and in return he was looking for a complimentary car which he had been given in the past." (367).

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Petitioner also mentioned specifically a debt collection for which he took credit involving a woman, presumably Eleanor Modica (367). Giuffrida did not accept at once, but after consulting with Charles Napolitano on the matter, he agreed and gave petitioner a new 1972 Chevrolet registered in petitioner's own name (368; 371-3; Peo. Exh. 36).

After this meeting, petitioner continued to render his services. In early 1972, Richard Zaia, Avis Car Control Manager, asked Giuffrida if he could contact Monty about cancelling some alarms (558). Giuffrida agreed and Monty was contacted (382-4). The alarms were then cancelled (Peo. Exhs. 37, 37A, 58B, 59A, 60A, 61A, 62A).

The Defendant's Case

Petitioner claimed the free cars were a gift from Fred Massaro.

Petitioner took the stand in his own defense and related how he had met Fred Massaro sometime in 1968 in the District Attorney's Office (900-05). He testified that two months later, he contacted Massaro about buying an Avis Car (905-06). After a meeting with Massaro, he (Massaro) gave him a free car for a month (908-09). Massaro mentioned the problem he was having parking all the cars he controlled (908). After the month was up, the free car was renewed (912). Monty again asked to buy a car but Massaro again said he didn't have one available (911). In giving him another free car, this time Massaro told him that petitioner's using the free car helped prevent its theft (912).

About a month later, petitioner returned and again tried to buy a car (913). Massaro once more told him he didn't

have one, but gave him another free car (913). The same thing happened again somewhere around September, 1968 (916). Again, Monty got a free car (918).

Throughout 1968, petitioner continued to get a free car (918-19). Sometime in 1969, petitioner stopped discussing buying a car (930). He admitted receiving a free car monthly for all of 1969 (923). He later admitted that the free car continued uninterrupted until November, 1972 (930).

Throughout his testimony, petitioner maintained that the only reason he got the four years of free cars was his friendship with Massaro. Several times when he picked up a car, he and Massaro had lunch or coffee and talked about their families (913; 916-17; 918; 919; 925; 927; 943-44). Massaro came to his home (931), introduced him to his superiors—Elkins, Elins and Napolitano (922), and called him "Uncle Joe" (922).

Petitioner also developed a friendship with Charles Napolitano (928). On one occasion, he went to lunch with Napolitano and Massaro (927). Another time, Monty said that he went to lunch with Massaro, Napolitano and Salvatore Giuffrida, where families were discussed (944-45).

In 1971 Massaro called him and informed him that he was leaving Avis (977). Massaro then assured him that he would continue to get a free car (979-80). Petitioner protested that he had to buy a car since then District Attorney Thomas Mackell had told him that an attorney for a defendant in Queens had informed one of Mackell's assistants of petitioner's free car and planned to use it as

leverage to get his client's case dismissed (986). Massaro then told petitioner that he would contact Giuffrida and later told petitioner to call Giuffrida (987). Petitioner called Giuffrida and arranged a luncheon meeting (988-9).

Petitioner stated that, when he met with Salvatore Giuffrida in September of 1971, he tried to give up the free car and buy one, but that Giuffrida insisted he continue to take a free car (992-93). Petitioner told Giuffrida of Mackell's request that petitioner get rid of his Avis car (992). Giuffrida then explained that he could give him a car with a private, not a rental plate (992). Monty said that this arrangement would be objectionable because his boss had insisted that he get rid of his complimentary car (992-93). Giuffrida then pointed out that the car would be registered in petitioner's name (993). After added assurances that everything would be okay, petitioner finally accepted the offer (993). He did not offer a reason for Giuffrida's insistence on giving him a free car.

Monty's Admissions and Denials

In addition to the receipt of free cars, petitioner admitted to cancelling certain alarms for Avis (1124-25), although he said he did so only five times (998). He also said that he always had someone else cancel the alarms for him (998; 1155).

Petitioner denied having discussed checks of criminal records at the luncheon with Mary Elliott and Gail Rachlin (938). He did admit, however, that he had caused checks of criminal records to be made for Avis, but claimed it

only happened three times (999). These services he said were performed by others for him (999-1000).

He denied having gotten a "yellow sheet" (Identification Section record) from anyone (934; 968). He denied knowing whether the Identification Section was contacted (999; 1000).

Monty admitted to having been involved in the Modica transaction, but denied that he was asked to collect the debt (984; 954-55; 1090-92). He admitted to having been involved in the Halpern transaction but again denied that anyone asked him to collect (955-56; 1095). He denied having been told by Seliger about Seliger's first conversation with Halpern (959). He also denied having told Napolitano of this conversation (1097-98). He denied recalling whether Charles Napolitano came to see him on March 25, 1971 (1123). He also denied that he had taken the $500 cash from Napolitano (975; 1141).

Petitioner denied that, at the luncheon with Salvatore Giuffrida, he had discussed the matters brought to him by Avis (993). He also denied that he had mentioned a collection matter involving a woman (1092-93).

At several points petitioner denied that he had ever had a discussion with Massaro or any other people from Avis about what he could do for Avis (929; 941; 944; 993; 1000).

ARGUMENT

POINT I

Petitioner was not denied any constitutional right by the appointment of Justice Murtagh as the presiding judge for the Extraordinary Term.

Petitioner Joseph Monty was tried before an Extraordinary Term of the New York Supreme Court, which had been established in October, 1972 by executive order of the Governor of New York pursuant to the authority vested in him by Article VI, Section 27 of the New York State Constitution and Section 149(1) of the State Judiciary Law.* The Hon. John M. Murtagh, a Justice of the New York State Supreme Court, was designated to preside over the Extraordinary Term.

Petitioner contends that "[t]he specific designation of a particular judge to try all the cases initiated by the

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*Article VI, Section 27, of the N. Y. State Constitution provides, in relevant part: "The governor may, when in his opinion the public interest requires, appoint extraordinary terms of the supreme court. He shall designate the * * * justice who shall hold the term." Section 149(1) of the Judiciary Law parallels the constitutional provision.

The Extraordinary Term of Court was mandated by executive order to handle matters brought before it by the New York State Special Prosecutor's Office. 9A N.Y.C.R.R. §§1.61-.65 (1972). The Special Prosecutor's Office had been created on September 19, 1972 by executive order of then Governor Nelson A. Rockefeller directing the Attorney General of New York to appoint a special deputy attorney general to supersede each of the District Attorneys in the five counties of New York City in all cases "arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York." 9A N.Y.C.R.R. §§1.55-.59 (1972). Pursuant to this executive order, the New York Attorney General appointed Maurice H. Nadjari a deputy attorney general and the Special State Prosecutor.

Special Prosecutor is discriminatory and violates both due process and equal protection of the law under the Fourteenth Amendment." Petitioner's Brief for Certiorari at 5.

Petitioner's argument that his trial before the Extraordinary Term of Supreme Court denied him his constitutional rights of due process and equal protection of the law is frivolous and without merit. Indeed, petitioner only expresses his argument in constitutional terms so as to gain access to this Court. A searching examination of petitioner's claim reveals that he is merely charging Justice Murtagh with bias.

Such a claim certainly does not meet the test of Rule 19 of this Court that a petitioner, to gain access to the Court, state a "federal question of substance." U.S. Supreme Court R. 19.

The Governor's authority under the New York State Constitution and the Judiciary Law to appoint an Extraordinary Term and designate a presiding justice has been squarely held by the New York Court of Appeals not to violate any right afforded by the United States Constitution. *People ex rel. Saranac Land & Timber Co.* v. *Supreme Court*, 220 N.Y. 487, 116 N.E. 384 (1917) (Cardozo, J.). *Saranac* has not been challenged or questioned by any court since it was decided in 1917. Recently, a lower state court in *People* v. *Davis*, 67 Misc. 2d 14, 322 N.Y.S. 2d 927 (Sup. Ct., Ontario Co. 1971), followed Judge Cardozo's decision in *Saranac* and forthrightly rejected the defendants' arguments that Section 149(1) of the Judiciary Law and Article VI, Section 27 of the New York Constitution were, on their face, unconstitutional. In view of

such established and well reasoned New York decisions, there is no proper basis justifying the granting of certiorari by this Court.

In the face of this constitutional and well established scheme concerning the designation of a special presiding judge for an Extraordinary Term, petitioner attempts to interpose a local court rule regarding the assignment of judges. Petitioner's Brief for Certiorari at 5. The New York Constitution, however, obviously supersedes such local court rules insofar as such rules are in conflict with a constitutional provision.*

Petitioner, moreover, places undue weight on the purported "substantive" policies behind these rules of court administration. While the assignment of judges on a random basis is a commendable and wise rule of judicial administration, it is not a constitutional requirement. In *United States* v. *Simmons*, 476 F.2d 33 (9th Cir. 1973), the Ninth Circuit rejected a defendant's claim that he had an absolute right to the random selection of a judge. And, in a later decision, *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir. 1974), the Ninth Circuit made it clear that the local court rule providing for random selection was "a

* Contrary to petitioner's assertion, rules of court have the force and effect of statutes *only* when they are made under *special* statutory authority. *In re Moore*, 108 N.Y. 280, 15 N.E. 369 (1888) (Petitioner refused an exemption from Court of Appeals rule requiring proof that applicant for admission as attorney has passed the regents' examination.). It should also be noted that any "conflict" between the New York Constitution and local court rules is limited to the designation of the presiding judge. As the Court of Appeals pointed out in *Reynolds* v. *Cropsey*, 241 N.Y. 389, 395, 150 N.E. 303 (1925), the Extraordinary Term is "to be conducted in accordance with the rules of law governing all other terms of court with the exception of a designation of the judge."

housekeeping rule for the internal operation of the district court which has a 'large measure of discretion in interpreting and applying' it" and that the local rule did not give a defendant "a vested right to any particular procedure," so long as the alternative procedure is constitutionally permissible.

The designation of a presiding judge for the Extraordinary Term is clearly such a constitutionally permissible procedure which does not result in any unconstitutional discrimination against persons in petitioner's position. In fact, it is difficult to even discern the alleged unconstitutional discrimination of which petitioner complains.

It is well established that, under the equal protection clause of the fourteenth amendment, states are permitted to make distinctions between persons so long as these are not "unreasoned" (*Williams* v. *Oklahoma City*, 395 U.S. 458, 460 (1969)) or "invidious." (*Griffin* v. *Illinois*, 351 U.S. 12 (1956)). It is equally well established that state distinctions between persons are constitutionally valid if there is some legitimate state purpose for which the classification is made and if the classification reasonably serves the state purpose. *See, e.g., Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966).

New York's scheme concerning the appointment of a special presiding judge for an Extraordinary Term is both rational and justifiable in light of the vital and substantial state interests involved. The extremely sensitive nature of the investigations conducted by the Office of the Special State Prosecutor, some of which concern individual mem-

bers of the state judiciary, requires that as few persons as possible know of on-going inquiries by the Office. The appointment of a special presiding judge for the Extraordinary Term serves to preserve the secrecy of such sensitive investigations.

Moreover, New York's scheme involves no invidious discrimination. The instant situation bears no resemblance to the state procedures condemned by this Court in *Griffin* v. *Illinois, supra*, which, in practical effect, distinguished between criminal defendants on the basis of their relative wealth.

Petitioner cannot reasonably argue that he would have fared any differently had he been tried before a Regular Term judge and a jury instead of before the Extraordinary Term and a jury. Certainly, the evidence overwhelmingly establishing his guilt of his crimes would have been the same had he been tried before a Regular Term judge and a jury. Moreover, evidentiary rulings and the charge to the jury (held by a unanimous Appellate Division to have been proper in the trial presided over by Justice Murtagh) would have been the same or substantially the same had petitioner been tried before a Regular Term judge.

In sum, while petitioner's trial before the Extraordinary Term may have been disparate from his trial before another State Supreme Court justice, such disparity, if any, does not even remotely approach the sort of "prejudicial disparities" prohibited by the equal protection clause of the Fourteenth Amendment. *Williams* v. *Oklahoma City, supra.*

Indeed, as mentioned at the outset, while petitioner expresses his argument in constitutional terms, in reality, he is merely charging Justice Murtagh with bias. Petitioner has based his entire argument on the faulty premise that a judge designated to preside over an Extraordinary Term will necessarily be an unfair and pro-prosecution judge. Such reasoning is clearly unsupportable at law and under the instant facts.

It should be noted that all of the petitioner's claims concerning Justice Murtagh's alleged actual bias on the trial were explicitly raised by him in his appeal before the Appellate Division. Petitioner's Brief before Appellate Division at 7-19.* Such claims were, however, soundly rejected by the Appellate Division in its unanimous affirmance of petitioner's conviction.

Finally, the precedents and other materials invoked in petitioner's brief reveal the lack of any real grounds for the granting of certiorari. To begin with, petitioner cites *Tumey* v. *Ohio,* 273 U.S. 510 (1927), and *In re Murchison,* 349 U.S. 133 (1955), in support of his argument, yet neither decision has any real bearing on the instant procedures. In *Tumey* v. *Ohio,* this Court, faced with a situation where the trial judge would be paid for his service only when the defendant was convicted, quite naturally held that the judge's direct pecuniary interest in conviction denied defendants due process of law. *In re Murchison,* meanwhile, involved a Michigan statute which, in effect, authorized a judge to act as a "one-man grand jury". Under this statute the judge was able to interrogate, charge, try and convict the same person. Certainly, the instant procedures

* Respondent's answer to these claims is found in its brief before the Appellate Division at 25-33.

do not involve the extremes presented in *Murchison* and *Tumey*.

In this same vein, petitioner cites *Loper* v. *Beto*, 440 F.2d 934, 941 (5th Cir. 1971), *vacated*, 405 U.S. 473 (1972), for the proposition that equal protection includes "the right to be tried in the same manner as others accused of similar infractions". *Loper* involved the right to a hearing in a parole revocation procedure. *Loper's* claim of a denial of equal protection was rejected by the Fifth Circuit and never passed on by this Court.

In sum, petitioner's claim that his trial before the Extraordinary Term denied him constitutional rights is baseless and, accordingly, review of petitioner's conviction by this Court is not justified.

POINT II

Petitioner was not denied the Sixth Amendment right to confrontation by the admission of Fred Massaro's statements.

Petitioner contends that the admission on his trial of certain statements of Fred Massaro* offered via other witnesses called by the prosecution constituted a violation of his sixth amendment right to confront witnesses against him.** Petitioner's Brief for Certiorari at 11.

* Massaro, a fugitive in Florida, was unavailable to testify at the trial (1181-1185).

** It is significant that while the issue concerning Massaro's statements was raised by petitioner in his post-trial motions before the trial court and his motion for reargument before the Appellate Division, it was not raised on petitioner's direct appeal to the Appellate Division presumably because its utter lack of merit was quite apparent.

It is petitioner's astonishing claim that the "entire [prosecution] case" was based on these statements. *Id.*

In fact, there was an overwhelming array of evidence, consisting of direct testimony by Avis personnel and extensive documentation conclusively establishing the corrupt relationship between Avis Rent-A-Car and petitioner which was wholly independent of Massaro's statements.

At issue, basically, are three conversations involving Massaro. One was between Massaro and Charles Napolitano; another was between Massaro and Richard Zaia; the last was between Massaro and Salvatore Giuffrida.

The first conversation consisted of testimony by Napolitano that Massaro told him that petitioner was the Chief Investigator of the Queens District Attorney's Office and that he had been helpful to Avis in the past and could be in the future (133).

After this conversation with Massaro, Napolitano testified that he learned through his direct contact with Avis documents and Monty himself that Monty was regularly receiving free cars, and that, in return for this Avis largesse, Monty played a role on behalf of Avis in the collection of bad debts (199-204).

The second conversation was one between Richard Zaia, an Avis employee, and Massaro concerning Monty's ability to cancel alarms for Avis (546). There was ample direct evidence, testimonial and documentary, independent of this conversation which established that Monty, in return for free Avis cars, was instrumental in cancelling stolen car alarms for Avis.

The final conversation consisted of testimony by Sal Giuffrida that in 1971, after Giuffrida had cancelled Monty's free Avis' car, Massaro called him and urged him to reconsider this action, because Monty as chief investigator for the local district attorney had been and could continue to be helpful to Avis (360-61). There was an abundance of evidence offered by Giuffrida of subsequent direct contact between him and Monty including a luncheon meeting at which Monty and Giuffrida explicitly agreed to the continuation of free cars for Monty provided he continue to render law enforcement services to Avis (367).

Petitioner's claim that the admission at his trial of these statements of Massaro through prosecution witnesses denied him his constitutional right to confront a witness against him presents no substantial federal question in view of this Court's decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970).

Testimony as to Massaro's statements was clearly admissible as the statements of an accomplice or of a co-conspirator in the furtherance of a criminal conspiracy.* The rule under which Massaro's statements were admissible, the co-conspirators exception to the hearsay rule, is well established in both federal and state law. *See* 4 Wigmore, Evidence §1079 (Chadbourn ed. 1972); Richardson, Evidence §244 (10th ed. 1973). In fact, the proposed Federal Rules of Evidence, in Rule 801(d)(2), even adopt this established exception to the hearsay rule.

* It should be noted that Massaro's statements were not admitted for their truth, but rather as the acts, conduct and statements of an accomplice of the defendant (131-32).

It is equally clear that the admission of Massaro's statements, the statements of a co-conspirator made in the course of a conspiracy, violates no constitutional right afforded petitioner. In *Dutton* v. *Evans, supra,* this Court held that the admission of a co-conspirator's declarations, though not made in the presence of the person against whom they were offered in evidence, did not violate the confrontation clause of the Sixth Amendment or the rule laid down in *Bruton* v. *United States,* 391 U.S. 123 (1968).

The decisions of this Court, relied upon by petitioner, of *Bruton* v. *United States,* 391 U.S. 123 (1968) and *Pointer* v. *Texas,* 380 U.S. 400 (1965), do not support petitioner's claim.

In the *Bruton* decision, the Court specifically noted that there was not before it "any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S., at 128 n. 3. Moreover, the Court in the *Dutton* decision explained that *Bruton* and *Pointer* v. *Texas, supra,* had no application to a case involving the introduction of a co-conspirator's statements. 400 U.S. at 84-86.

Finally it should be noted that the fact that petitioner was not specifically charged with conspiracy is of no import. In *Dutton,* the defendant was not prosecuted for conspiracy, but rather for the substantive offense of murder.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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